

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Applications of Comcast Corporation,)
Time Warner Cable Inc., Charter)
Communications, Inc. and Spinco)
to Assign and Transfer Control of FCC)
Licensees and Other Authorizations)
)
To: The Transaction Team)
Office of General Counsel)
and the Media and)
Wireline Competition Bureaus)

MB Docket No. 14-57

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REPLY TO COMCAST OPPOSITION TO ELAN FELDMAN PETITION TO DENY

ELAN FELDMAN hereby respectfully submits this Reply to the Opposition of Comcast Corporation to my Petition to Deny the above-captioned applications for approval of the sale of certain cable systems and assets of Time Warner Cable, Inc. ("TWC") to Comcast Corporation ("Comcast") and to make certain additional and ancillary transfers and assignments in support of the Comcast-TWC sale of systems and assets. This Reply is being submitted pursuant to the rules of the Commission and the procedures and time line requirements set forth in Public Notice, DA 14-986, released July 10, 2014.

WHEREFORE, the following is stated:

1. On August 25, 2014, the undersigned filed a Petition to Deny ("Feldman Petition to Deny") objecting to the transfer from TWC to Comcast of certain Title 2 and Title 3 authorizations as requested by those companies in filings described in the Public Notice. The Feldman Petition to Deny the transfer of control consisted of 11 pages of a sworn statement describing the manner in which Comcast is willfully and repeatedly violating §541(a)(2)(C) of the Communications Act of 1934. This statutory provision requires that just compensation be paid to property owners "...who have suffered damages as a result of a cable operator's construction, operation, installation or removal of its cable television facilities." The Petition

chronicled a nearly decade-long effort on my part to seek the relief of this federal statute after a protracted series of events resulting in large damages occurring to person and property from Comcast's trespass. Comcast's treatment of the damages it caused from the onset of its trespass is best exemplified by the company's dismissive response to my Petition. In a tone emblematic of the Comcast corporate culture, the company's response is largely contained in a single footnote to its Opposition. This leaves the *prima facie* case advanced in my Petition completely un rebutted. Specifically, note the following:

FELDMAN PETITION

COMCAST RESPONSE

Comcast trespassed on Petitioner's roof without permission in violation of §541(a)(2) of the Communications Act (Feldman Petition, ¶ 1)

Unrebutted

The trespass and unauthorized use of Petitioner's property continued unabated for 7 months (Feldman Petition, ¶ 7)

Unrebutted

During this 7 month period two hurricanes exacerbated the roof damage (Feldman Petition, ¶¶ 2 & 4)

Unrebutted

Business records, office equipment and personal injury resulted from Comcast's unabated trespass (Feldman Petition, ¶¶ 4, 5 & 13)

Unrebutted

§541(a)(2) of the Communications Act limits construction of cable systems to public rights of way and easements and there were no such rights of way on my roof (Feldman Petition, ¶ 9)

Unrebutted

§541(a)(2)(C) of the Communications Act requires just compensation for property owners damaged by cable operators which has not occurred in my case (Feldman Petition, ¶ 9)

Unrebutted

Comcast asserts that the local franchising authority has no jurisdiction in this matter (Feldman Petition, fn. 3)

Unrebutted

NECESSITY TO REBUT A PRIMA FACIE CASE

2. § 309(d) of the Communications Act is the source of the congressionally mandated right to file a petition to deny laying out a *prima facie* case showing that a license grant would be against the public interest. Under this statute, the one requesting a license grant or transfer is given "...the opportunity to file a reply in which allegations of fact or denials thereof shall be supported by affidavit." See, 47 USC § 309(d)(1). That Comcast elected not to do so was its own decision, however, "...the Commission does not have the freedom to violate the command of § 309(d)...". *Office of Communications of the United Church of Christ v. Federal Communications Commission*, 779 F 2d 702, at 711 (1985) The Feldman Petition to Deny set forth a *prima facie* case meeting the evidentiary standard required by § 309(d). Comcast did nothing to refute the sworn facts and they remain unrebutted on the record.

DICHOTOMY OF COMMISSION-RELATED & NON-COMMISSION RELATED CASES

3. To the extent Comcast offered any legal argument against my Petition, it chose to include it in the section addressing petitioners' challenges to Comcast's character qualifications. There, Comcast notes that there have been lines of "separate analyses" in the case law applied to "Commission related" conduct as opposed to behavior that is deemed to be "non-Commission related." Further, any analysis of non-Commission related behavior can only be considered by the Commission if the conduct has involved "adjudicated matters," *i.e.*, the facts surrounding the conduct were adjudicated to finality in another forum. This division of treatment does in fact exist in the case law as between Commission related and non-Commission related conduct. However, Comcast is wrong in implying that my Petition is grounded in non-Commission conduct.¹

4. One case cited by Comcast for the "separate analyses" standard is *Application of Green Eagle Networks, Inc. and Convey Communications, Inc for Commission Consent to the Assignment of Personal Communications Service Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 5732 ¶14 (2012) ("*Green Eagle Order*"). Included in the excerpted material quoted by

¹ Comcast has argued out of both sides of its mouth on the question of whether this matter is grounded in federal or local law. As noted in the Feldman Petition to Deny, at a sworn Deposition conducted In Philadelphia, Pennsylvania on May 8, 2013, Comcast Senior Counsel Marna Salimena explained why Comcast would not sit down at the mediation table with me when she said, "We [Comcast] would be happy to mediate the case, but Dade County doesn't have jurisdiction over the matter. So we're not going to mediate with an agency or any entity that doesn't have jurisdiction to oversee the matter."

Comcast from the *Green Eagle Order*, is the holding that, "With respect to Commission related conduct, the Commission has stated that all violations of provisions of the Act...are predictive of an applicant's future truthfulness and reliability, and thus have a bearing on an applicant's character qualifications." (emphasis added) In the same footnote in which Comcast cites the *Green Eagle Order*, it references the *Policy Regarding Character Qualifications*, 102 FCC2d 1179 ¶23 (1986) in which the Commission held, **without limitation**, that "We will be concerned with misconduct which violates the Communications Act...**and** with certain specified non-FCC misconduct..." (emphasis added) In other words, misconduct which violates the Communications Act AS WELL AS certain other types of non-FCC conduct can give rise to character qualifications issues. But it is the former category that is relevant in this case because it is the Federal Communications Act that Comcast has violated.

5. Both the *Green Eagle Order* and the *Policy Involving Character Qualifications* stand for the proposition that infractions directly against the Communications Act do in fact give rise to character qualifications issues. Requiring full prior adjudication in a state or local forum of a cause clearly arising under the Communications Act would render that federal law a nullity. For if a subscriber, customer (or even an innocent bystander) damaged by Comcast in the course of its installation work were to have to privately litigate a matter arising under the Communications Act to finality in another forum prior to asserting his or her cause before the Commission, there would be virtually no person in the country with the resources necessary to bear such an insufferable economic burden. Requiring the pursuit of Comcast to a final adjudication on a matter it has not the slightest interest or concern in resolving is akin to diving into quicksand to reach the other side of a pit. Indeed, after nine years in pursuit of Comcast, I can attest to the aptness of this metaphor. There are very few people who would stay in the pursuit as long as I; a factor that no doubt plays to the benefit of Comcast. But it should not be allowed to sidestep provisions of the Communications Act by foot-dragging its way through other legal processes.

FELDMAN PETITION SHOWS COMMISSION-RELATED MISCONDUCT

6. Clearly, the matter raised in my Petition involves ongoing violations of the Communications Act as highlighted in Paragraph 1 above and in the Petition. Comcast is therefore mistaken that the basis for my Petition is grounded in non-Commission matters and is further mistaken as to the necessity of "adjudication" preceding any consideration by the Commission of the matters I've asserted. The Feldman Petition to Deny is grounded in Comcast's ongoing willful and repeated violation of §541(a)(2)(C) of the Communications Act

of 1934, as amended.² As stated in the *Green Eagle Order*, "...all violations of provisions of the [Communications] Act...are predictive of an applicant's future truthfulness and reliability." I am asserting that these laws have been violated and have presented a *prima facie* case that Comcast leaves entirely un rebutted.

VIOLATIONS CONTINUE AFTER NBCUNIVERSAL DECISION

7. Comcast asserts in its single footnoted response to my Petition, that the Commission has "...fully addressed and rejected precisely the same claims..." as had been previously advanced in my petition in the NBCUniversal merger case (Docket No. 10-56).³ But this side-steps the fact that the basis for relief set forth in the Petition in this Docket is framed specifically on the violations of § 541(a)(2)(C) of the Communications Act that have occurred "...subsequent to consummation of the Comcast NBCUniversal merger and leading up to the present date..." and that, as such, they "...present a case of first impression before the Commission."⁴ These violations are continuing, willful and repeated and Comcast should not now be somehow immunized *in perpetuity* from its obligation to comply with federal statutes based on a prior decision of the Commission.

8. In reply to the argument that the Feldman Petition to Deny is based on non- Commission related conduct, there is further evidence of the Commission-related nature of actions I know to have been taken by Comcast. This evidence not only demonstrates the Commission related nature of Comcast's actions, it also raises questions as to whether Comcast lacked candor in certain prior representations it made to the FCC. Although these facts arise from representations Comcast made to the Commission in the course of the company's now concluded prosecution of its NBCUniversal merger, they did not manifest themselves until after the conclusion of that proceeding. Nevertheless, they clearly support the assertion that Comcast's conduct is Commission related.

9. When Comcast filed its application for approval of the transfer of control in NBCUniversal, Docket No. 10-56, several petitions to deny the approval of that transfer were

² My Petition in this Docket also shows that the current willful and repeated violation of § 541(a)(2)(C) is occurring against the backdrop of another violation, namely, the original infraction of §541(a)(2) where Comcast built out its network in an area that did not include an easement or public right of way as required by the Communications Act.

³ See, Comcast Opposition, fn. 989

⁴ See, Feldman Petition to Deny, fn. 6.

filed. One of those petitions was that of the undersigned who had requested that the Commission deny the merger based on Comcast's trespass upon my property, the damage resulting therefrom and the refusal to provide just compensation. In accordance with the requirements of §309(d)(1) of the Communications Act relating to the filing of pleadings responsive to petitions to deny, Comcast transmitted its Opposition documents under the sworn statement of David L. Cohen, Comcast's Executive Vice President. That statement attested that the facts alleged therein were true and correct.

10. During the course of the prosecution of my Florida lawsuit against Comcast to recover the damages inflicted on my roof as referenced in my Petition⁵, I attempted to have Mr. Cohen called to testify in discovery proceedings. He was the correct person to summons since it had been Mr. Cohen's Declaration executed on July 21, 2010 that was filed in the NBCUniversal merger matter, representing that the facts attested to in Comcast's Opposition were "true and correct" including, of course, the facts surrounding and purporting to rebut my Petition.

11. When my counsel summoned Mr. Cohen in the discovery phase of the Florida lawsuit, Comcast filed a Motion for Protective Order on April 27, 2011 asserting that Mr. Cohen had no personal knowledge regarding the matters I pled in my Petition in Docket No. 10-56. Since Mr. Cohen had sworn to those very facts the preceding year in the Opposition executed in July 2010, this is further evidence that the cause I am raising is Commission related (since the Cohen Declaration was clearly filed in a Commission proceeding). A further question is presented regarding Comcast's candor when it asserted that the facts advanced in its Opposition, specifically those used to rebut my petition in Docket No. 10-56, were true and correct.

SUMMARY

12. I have presented a *prima facie* case raising an issue regarding an apparent failing on the part of Comcast relating to character qualifications requisite to obtain the merger authority being sought in this proceeding. This showing was submitted in compliance with the requirements of §309(d) of the Communications Act. Comcast has left unrebutted all of the facts asserted. It has failed to go through even the most rudimentary motions of meeting its rebuttal burden under §309(d). The Petitioner, on the other hand, has presented a *prima facie* case and the relief requested below should therefore be granted.

⁵ See, Feldman Petition to Deny, ¶ 12.

WHEREFORE, the undersigned respectfully requests that the Commission DENY the captioned applications seeking to effectuate the sale of certain cable systems and assets of TWC to Comcast and to make certain additional and ancillary transfers and assignments in support of the Comcast-TWC sale of systems and assets; or, in the alternative and in the event the Commission grants the requested assignments and transfers, to CONDITION SUCH GRANT on Comcast meeting the post-closing conditions as requested in my Petition.

The undersigned declares under penalty of perjury that the facts referenced in the foregoing Reply are true and correct to the best of my knowledge, information and belief.

Executed on October 6, 2014



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CERTIFICATE OF SERVICE

I, Elan Feldman, do hereby certify that a copy of the foregoing Reply to Opposition to Petition to Deny was served on the following persons by the means set forth below on the 8th day of October, 2014.

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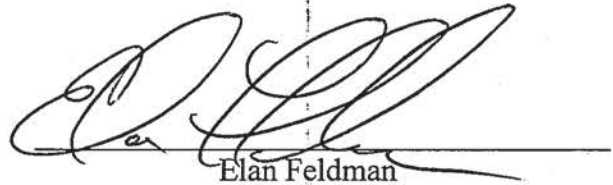
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